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Supreme Court, U.S.
FILED

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No. 10-_____

In The
Supreme Court of the United States

John Steadman Nilsen,
Petitioner,

v.

State of California,
Respondent.

On Petition for a Writ of Certiorari
to the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1

Since a Petition for Review in the California Supreme Court results in a decision on the merits, should this Court reconsider and/or limited the holding of *Ross v. Moffit*, 417 U.S. 600 (1974), holding that a criminally accused cannot be denied the Sixth Amendment right to counsel in his or her state petitions for discretionary review, where, as here, the issue arises in the context of the right to petition for such review, not the right to appointed counsel on such review?

2

Does a state prisoner whose counsel on first-tier review, fails to inform him that the decision on appeal has been filed until more than six months after his discretionary review (second tier) petition for review is due, and who falsely tells him that counsel has timely filed that petition, deprive him of effective assistance of counsel in direct appeal in violation of the Sixth and Fourteenth Amendments?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Nilsen respectfully petitions for a writ of certiorari to review the summary denial of his habeas corpus petition to the California Supreme Court requesting permission to file a belated petition for review of the decision of the California Court of Appeal affirming his criminal conviction for first degree murder and sentence of life without the possibility of parole because his appellate counsel rendered ineffective assistance on direct appeal.

OPINIONS BELOW

The California Supreme Court's denial of the habeas corpus petition without any citations or explanations is attached as Appendix A.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a). The order of the California Supreme Court was filed on May 20, 2010. This petition is filed within 90 days of the denial.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A jury convicted petitioner John Steadman Nilsen inter alia of first degree murder and found that the murder was committed during the commission of a robbery. Petitioner was sentenced to life without the possibility of parole. The California Court of Appeal affirmed in an unpublished opinion.

Thereafter a Petition for Review was not filed in the California Supreme Court, barring petitioner from challenging his conviction on collateral review in the federal courts, since the deadline for filing said review has passed and his constitutional claims remain unexhausted.[1]

The record below is clear that petitioner's appellate counsel, not petitioner, is responsible for the failure to exhaust petitioner's claims. In a sworn affidavit, appellate counsel attests that despite a request by petitioner, and knowledge that petitioner

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[1] The exhaustion requirement arises from 28 U.S.C. § 2254(b)(1)(A) which limits the availability of relief to cases where the applicant has exhausted state remedies or 28 U.S.C. § 2254(b)(1) "(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." Federal courts generally do not grant an application for relief under 28 U.S.C. § 2254 unless the applicant has exhausted the remedies available in the state courts. See *Coleman v. Thompson*, 501 U.S. 722, at 731. (Claims asserted in a petition under § 2254 are exhausted if the petitioner "fairly presented" the claims to each level of the state courts.)

ultimately wanted to seek federal habeas relief, he did not file a petition for review in the California Supreme Court. Nor did he notify petitioner, who was incarcerated, that he lost on direct appeal until almost eight months afterwards- long after the deadline for filing a petition had passed. Hence petitioner lost the opportunity to file the petition in a pro se capacity. (See Declaration of appellate counsel, Appendix B.)

When appellate counsel finally did write to petitioner informing him of the appellate court decision, he represented that the Petition for Rehearing and the Petition for Review he had promised to file, *had been filed*, and denied. In truth, counsel had not filed either. Furthermore, counsel provided petitioner the wrong date on which the Court of Appeal had affirmed his conviction, writing that the conviction was affirmed on September 22, 2008, rather than the correct date of June 30, 2008. Finally, counsel failed to provide a copy of the appellate opinion, further depriving petitioner of valuable information.

When retained to represent petitioner on direct appeal, counsel assured petitioner that he would "do everything I can to have your conviction reversed," including making sure the record was "preserved" for later review in federal court. In a letter to petitioner before the appellate court's decision, counsel wrote, "this issue cannot be raised in the appeal because it is not part of the record. However, it is a very good issue for habeas."

Counsel and petitioner discussed petitioner's desire to seek discretionary relief and in fact counsel

advised petitioner that some of his claims appeared to have merit. (Declaration of petitioner attached as Appendix C.) Despite all of this, counsel failed to file a petition for review or a petition to exhaust state remedies in the California Supreme Court.

Current counsel filed a habeas corpus petition in the California Supreme Court asking leave to file a belated petition for review because of appellate attorney's incompetence in failing to complete the tasks integral to his representation on direct review.

The California Supreme Court summarily denied petitioner's request to file a belated petition for review, without comment or citation.

REASONS FOR GRANTING THE WRIT

I. Since a Petition for Review in the California Supreme Court Results in a Decision on the Merits, This Court Should Reconsider And/or Limit *Ross v. Moffit*, 417 U.S. 600 (1974).

This court should grant petitioner's writ because although California did not state a reason for its denial of petitioner's writ in this case, presumably it was because of the dictates of Ross, which California is bound to follow.

In *Douglas v. California*, 372 U.S. 353, this Court held that in criminal proceedings a State must provide counsel for an indigent defendant in a first appeal as of right. This is true for two reasons: An appeal "of right' is an adjudication on the merits, *Id.*, at 357; and first-tier review differs from later appellate stages, *Id.*, at 356.

In *Ross v. Moffitt*, 417 U.S. 600, this Court concluded that a defendant has no constitutional right to counsel in pursuing a writ of certiorari in the United States Supreme Court. *Id.* at 617. By so holding, the Court concluded that states are under no obligation to appoint counsel for indigent defendants to seek discretionary state appeals or certiorari petitions. *Id.* at 617-18.

In *Wainwright v. Torna*, 455 U.S. 586, this Court held that a state criminal defendant has no constitutional right to the effective assistance of counsel when pursuing a discretionary state appeal., "Since respondent had no constitutional right to counsel," the Court observed, "he could not be deprived of the effective assistance of counsel . . . ." *Id.* at 587-88. The reasoning in *Torna* rests on a single proposition: if the state is not constitutionally required to provide a lawyer, the Constitution cannot place any constraints on that lawyer's performance. The four-paragraph opinion in *Torna* relies on only one authority, *Ross*.

This Court shed further light on the matter in *Halbert v. Michigan*, 545 US 605. The court ruled that counsel must be made available to a defendant on a first-tier discretionary appeal; at least where the discretion guiding grant or denial depends on the merits of the claim, rather than the importance of the question. *Id.* at 618.

In *Halbert*, an amendment to Michigan's constitution provided that a defendant who pled guilty or nolo contendere could appeal to the Michigan Court of Appeals only by leave of that court. 545 US 605, 609. Under Michigan law, a

defendant convicted by plea was required to file an application for leave to appeal with the Michigan Court of Appeals. *Halbert* at 612. The court then could "'grant or deny the application; enter a final decision; [or] grant other relief.'" *Id.* (quoting Mich. Ct. Rule 7.205(D)(2)). If the court granted the application, the case would proceed as an appeal of right. *Id.* The Michigan appeals court routinely cited "lack of merit in the grounds presented" as a reason for denying leave to appeal. *Id.* Michigan refused to allow appellate counsel to be appointed to indigent defendants for the purpose of seeking leave to appeal. *Id.* at 613.

The Supreme Court determined that defendants' rights to due process and equal protection were violated by Michigan's failure to provide for counsel for the purpose of seeking leave to appeal. *Halbert*, 545 US 605, 610-611. The Court reasoned that although the defendants were not entitled to an appeal as of right, they were "entitled to apply for leave to appeal." *Id.* at 617. "Of critical importance," the Court noted, was that "the tribunal to which [a defendant] addresses [his or her] application, the Michigan Court of Appeals, unlike the Michigan Supreme Court, sits as an error-correction instance." *Id.* Accordingly, in determining whether to grant leave to appeal, the Michigan Court of Appeals necessarily considered "the merits of the applicant's claims." *Id.* at 619.

Michigan's Court of Appeals is guided by the merits of the particular defendant's claims presented in responding to leave to appeal applications, not by the general importance of the question. Therefore the

defendant is entitled to an attorney for purpose for seeking allowance of appeal. *Halbert*, 545 US 605, 623.

When a California Supreme Court denies a petition for review without citation or comment, it will be assumed that the state Supreme Court has been given a fair opportunity to review the merits of the petitioner's state habeas claim. *Roman v. Estelle* (9th cir 1990) 917 F2d 1505. (See also *Gaston v. Palmer*, 417 F.3d 1030, 1038 (9th Cir. 2005), *as amended by* 447 F.3d 1165 (9th Cir. 2006) ("We construe 'postcard' denials such as these to be decisions on the merits"); *Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); See also Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) 28 USC §2854 (b). Therefore, under the reasoning of *Halbert*, a defendant is entitled to an attorney and effective assistance when filing a Petition for Review. Petitioner was denied this here.

A denial of petition for review means the issues were fairly presented and denied on the merits. It is a petition seeking to correct the record. Since a denial of a Petition for Review in the California Supreme Court is a ruling on the merits, it is a conclusion no error occurred and therefore this review is not discretionary.

If a defendant must obtain a decision on the merits to exhaust constitutional claims brought in a federal petition for writ of habeas corpus, then he is entitled to counsel and effective assistance in the petition for review process.

Petitioner was entitled to counsel and counsel rendered ineffective assistance for failing to file a petition for review to exhaust state remedies as promised. To support a claim for ineffective assistance of counsel, petitioner must prove both the objectively deficient performance of his counsel and prejudice. *Strickland v. Washington*, 466 U.S. 668. This applies equally to appellate counsel. Roe v. Flores-Ortega, 528 U.S. 470.

Here, there could have been no strategic reason to not file a Petition for Review. Counsel admits in his declaration he failed to file a Petition for Review despite being asked to do so by his client, knowing his client wanted to seek federal relief and misrepresenting to his client that he had done so after it was too late for petitioner to file it on his own.

Accordingly, petitioner should be granted his relief requested so that he can file a belated Petition her review in the California Supreme Court.

II. A State Prisoner, Whose Counsel on First-Tier Review Fails to Inform Him that the Decision on Appeal Has Been Filed Until More Than Six Months After His Discretionary Review (Second Tier) Petition for Review Is Due, and Who Falsely Tells Him That Counsel Has Timely Filed That Petition, Deprived Him of Effective Assistance of Counsel in Direct Appeal in Violation of the Sixth and Fourteenth Amendments.

A criminal defendant on direct appellate review is guaranteed effective assistance of appellate counsel. *Roe v. Flores-Ortega*, 528 U.S. 470;

Strickland v. Washington, 466 U.S. 668. Under this duty, counsel should be required, at a minimum, to timely notify his incarcerated client regarding the decision of the appellate court and provide a copy of the decision so that his client can pursue a Petition for Review pro per or seek counsel to do so. Here, appellate counsel did not inform petitioner, who was incarcerated, that he lost on direct appeal until almost eight months afterwards- long after the deadline for filing a petition had passed. Hence petitioner lost the opportunity to file the petition in a pro se capacity. Further, when appellate counsel finally did write to petitioner informing him of the appellate court decision, he represented that the Petition for Rehearing and the Petition for Review he had promised to file, *had been filed*, and denied. In truth, counsel had not filed either.

It is petitioner's position that his appellate counsel was constitutionally obligated under his first-tier obligations as appellate counsel to file the Petition for Review and protect petitioner's ability to seek later review in the federal courts. Something he advised his attorney he wanted to do. If this Court disagrees, petitioner still should get relief since his counsel failed in his responsibilities as appellate counsel to timely and accurately notify petitioner so that he could file a Petition for Review on his own. In this regard, Nilsen is not seeking to establish a right to an effective, court appointed counsel to file a Petition for Review, but a right to counsel on direct appeal (first-tier, DCA) sufficient to enable him to file his own petition. If this is not the law, then petitioner, and others similarly situated, is in an

untenable position. It is impossible for them to file a Petition for Review in the state court, a necessary precursor to obtaining later federal review.

In *Wainwright v. Torna*, 455 U.S. 586, the Supreme Court said, per curiam, since petitioner had no constitutional right to counsel to pursue discretionary review by the Florida Supreme Court, he could not, ipso facto, be deprived of effective assistance of counsel by his retained counsel's failure to timely file application for certiorari. The court's opinion was based solely on *Ross*.

The rationale of *Ross* was that with adequate assistance of counsel in the first-tier state review, the defendant would have enough to go forward on his own. A defendant who had already benefited from counsel's aid in a first-tier appeal as of right would have, "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review." *Ross*, 417 U.S. 600, 615.

Here, of course the *Ross* reasoning does not apply since petitioner did not have knowledge of the decision, transcripts or even the court of appeal opinion to go forth on his own. Moreover, even if he did have such items, he was precluded from filing a

Petition for Review because by the time he was notified the deadline to file had long passed.

Appellate counsel failed in his obligations to petitioner in direct first-tier appeal. As a result, petitioner did not get his Petition for Review in the California Supreme Court. In *Sims v. State*, 998 So.2d 494 (Fla SupCt 2008) the petitioner contended that his attorney did not properly supply him with a copy of the decision below or keep him apprised of the case status, which precluded him from filing a timely pro se petition for discretionary review. The Florida Supreme Court held was denied effective assistance of counsel based on his counsel's failure to notify him that his appeal had been denied and that he had a right to file for discretionary review. See also *Harrington v. Gillis*, 456 F.3d 118 (3rd Cir. 2006) [applying *Roe v. Flores-Ortega*, 528 U.S. 470]. Other cases supporting this view and/or the view that where the state allows the application as of right, the defendant should be entitled to effective assistance of counsel in making that application are: *Shiloh-Bryant v. Director*, 104 F.Supp.2d 696 (ED TX 2000) [Holding: Petitioner was denied effective assistance of counsel based on his counsel's failure to notify him that his appeal had been denied and that he had a right to file for discretionary review.]

It is axiomatic that an appellate attorney is obligated to timely apprise his client of the result of the appeal.

Appellate counsel must maintain an obligation of effective representation to his client at least until

the decision of the appellate court is rendered and that decision is transmitted to the defendant.

An attorney is obligated to apprise his client of the opinion and has ongoing duties and obligations once the appeal is filed. For example, appellate counsel's failure to file a petition for rehearing deprives a defendant of a critical stage of the direct appeal, allowing the correction of facts misstated by the court of appeal decision.

In *Roe v. Flores-Ortega*, 528 U.S. 470, this court held that the proper framework for evaluating a claim that counsel was ineffective on appeal is governed by *Strickland v. Washington*, 466 U.S. 668 (See Issue I, ante.).

This court is urged to find that on the facts of this case, counsel's failures are properly characterized as advice in his continuing role as direct appellate counsel, not certiorari counsel. As such, petitioner was deprived of effective assistance of counsel since he has a constitutional right to have his attorney properly carry out his obligations on direct appeal by making sure petitioner's adequately apprised of the critical stages of the first-tier appellate process. This must be part and parcel of counsel's duties on direct appeal because the consequences of his failure to do this are dire. In this case, it has deprived petitioner of his right to have his issues exhausted in state court so that he can pursue federal habeas relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 2010

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Appendix A

S1765296

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re John Steadman Nilsen on Habeas Corpus.

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

MAY 20 2010

Frederick K. Ohlrich Clerk

_____
Deputy

GEORGE

_____
Chief Justice

Appendix B

Declaration of Brent Romney

I, Brent F. Romney, say:

1. I am an attorney at law, licensed to practice in the Courts of the State of California, and I am in good standing with the California State Bar.

2. I was retained to represent petitioner, John Steadman Nilsen, on direct appeal from Orange County Superior Court case No. 04WF0832; Court of Appeal case number G038070. I filed Nilsen's opening and reply briefs. In April, 2008, I associated in Attorney Thomas Dunn as co-counsel. On June 17, 2008, Mr. Dunn argued Nilsen's case before the Court of Appeal, Fourth Appellate District, Division Three.

3. On June 30, 2008 Nilsen's conviction was affirmed by the Court of Appeal, in an unpublished opinion.

4. In a letter dated February 5, 2009, I wrote to Nilsen to advise him of the decision of the appellate court and inform him that a Petition for Rehearing with the Court of Appeal and a Petition for Review with the California Supreme Court had been filed. I wrote: "I want to update you on the status of your appeal. On September 22, 2008, the Court of Appeal affirmed your conviction. Since that date, a Petition for Re-Hearing was filed and denied. A subsequent petition to the Supreme Court to hear and consider your appeal was also denied. I am dismayed by the

decisions of the appellate courts in your case. However, I have now exhausted all appellate remedies in your case."

5. I intended to cause a Petition for Rehearing and a Petition for Review with the California Supreme Court be filed in Nilsen's case, but neither were filed. As stated in my May 18, 2009 e-mail to attorney Bill Kopeny, "I recall asking Tom [co-counsel Tom Dunn] to file Application for Reconsideration, and if denied, petition Supreme Court for hearing (sic). I then began another 187 jury trial, then another. I didn't talk to Tom for a while. John Nilsen inquired as to the status of his case. I had heard nothing re Tom or appeal (sic), so I wrote John Nilsen and advising him of the outcome (sic). I recall I told him that application for rehearing was denied and supreme court did not grant hearing (sic), assuming I would have heard otherwise if anything different had occurred. I also told John Nilsen that a writ should be considered . . . A few days later, I contacted Tom, who told me he thought I was going to file application for reconsideration, then petition supreme court if necessary (sic) so, no application for hearing was filed nor was petition to supreme court filed."

6. In the February 5 letter, I provided Nilsen the wrong date that the Court of Appeal affirmed his conviction. I wrote that the conviction was affirmed on September 22, 2008. The conviction was actually affirmed June 30, 2008.

7. When retained to represent Nilsen, I advised him that I would file his appeal and ensure that his

state appellate rights were exhausted. I was aware he might want to later file a writ of habeas corpus in state and federal court.

8. The failure to file the Petition for Rehearing and Petition for Review to exhaust state remedies was not strategic and was not due to any fault or delay on the part of Mr. Nilsen.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 9-14-09

/s/
Brent F. Romney
Attorney At Law

Appendix C

Declaration of William J. Kopeny

I, William J. Kopeny, say:

1. I am an attorney at law, licensed to practice in the Courts of the State of California and of the United States. I have been a member in good standing of the California State Bar since December 20, 1974. I am certified by the California State Bar as a specialist in the areas of Criminal Law and Appellate Law.

2. This declaration is made at the request of Correen Ferrentino, Esq., attorney for Nilsen, California State Prison Number C-28087.

3. My entire acquaintance and interaction with Mr. Nilsen took place between April and June, 2009.

4. I received a letter dated May 1, 2009[1] from Mr. Nilsen asking me to consider representing him to seek to attack his conviction in Orange County Superior Court case number 04WF0832, in which he was sentenced to an eighty (80) year prison term. Enclosed in Mr. Nilsen's letter was a letter dated February 5, 2009 from attorney Brent Romney, an attorney with whom I have been familiar for many years. I have attached a copy of the 2/5/09 Romney letter as Exhibit A to this Declaration.

5. In the letter, Mr. Romney wrote:

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[1] I believe this letter was actually sent late in April because it came in an envelope I retained which is postmarked 4/28/09.

"On September 22, 2008, the court of Appeal affirmed your conviction. Since that date a Petition for Re-Hearing was filed and denied. A subsequent petition to the Supreme Court to hear and consider your appeal was also denied. [¶] I am dismayed by the decisions of the appellate courts in your case. However, I have now exhausted all appellate remedies in your case." Please see Exhibit A, 2/5/09 Romney Letter to John Steadman Nilsen, C28087.

6. On May 2, 2009 I mailed and sent via facsimile a letter to Mr. Romney indicating that I had been contacted by John Nilsen for possible post-appeal representation, asking for copies of the appellate briefs, including the Petition for Rehearing and Petition for Review, and the orders denying each as referenced in Exhibit A. I have attached a copy of my 5/2/09 letter to Mr. Romney as Exhibit B to this Declaration. Please see Exhibit B, 5/2/09 Kopeny Letter to Brent F. Romney, Esq..

7. Sometime after receiving Mr. Nilsen's letter, I researched the online website for his Court of Appeal case and learned: (a) that the California Court of Appeal, Fourth District, Division Three on line case information for case number G038070 indicated that the opinion affirming Mr. Nilsen's conviction in full was filed on June 30, 2008. I have attached a copy of the California Courts—Appellate Courts Case Information Docket for this case as Exhibit C to this Declaration.

8. No Petition for Rehearing was shown on the docket and it contained dates following June 30, 2008 beyond the 15 day Remittitur Issued on

September 3, 2008, but did not note any Petition for Review being filed. Please see Exhibit C, California Courts-Appellate Courts Case Information Docket for Case Number G038070, p.3 of 4.

9. I also searched the on line records for the California Supreme Court which also contained no record of any Petition for Review being filed on behalf of Mr. Nilsen in this case.

10. I did not receive a response to my May 2, 2009 letter to Mr. Romney, which was faxed and mailed, so on May 18, 2009 I researched Mr. Romney's public e-mail address as listed on the California State Bar website and sent him an e-mail. In that e-mail thread, attached as Exhibit D to this Declaration, I: (a) referenced my prior (5/2/09) letter; (b) indicated that there may be a timing issue for Mr. Nilsen; and (c) requested a reply to my letter. Please see Exhibit D, 5/18/09 Kopeny E-mail to Romney.

11. Mr. Romney responded to my e-mail on May 18, 2009 stating I substance: (a) he had received my letter dated 5/2/09; (b) he was then [on 5/18/09] in trial; (c) he had Mr. Nilsen's entire appeal file; (d) he worked on the appeal with Thomas Dunn, Esq.; (e) he "recall[ed] asking Tom [Dunn] to file an Application for Reconsideration, and if denied, petition Supreme Court for hearing."; (f) John Nilsen inquired of the status of the case, and at the time he [Romney] had heard nothing but he assumed if rehearing or review had been granted, he would have heard so he wrote and told Mr. Nilsen that both had been denied; (g) "A few days later" he

spoke with Mr. Dunn, who told Romney that he thought Romney was going to file both petitions; (h) "So, no application for rehearing was filed, nor was petition to Supreme Court filed." Please see Exhibit D, 5/18/09 Romney E-mail to Kopeny.

12. In the e-mail, Mr. Romney expressed views that caused me to conclude that neither he nor Mr. Dunn were familiar with California Rule of Court, Rule 8.508, which allows appellate counsel to file an abbreviated Petition for Review in the California Supreme Court for the purpose of exhausting state remedies, which is a prerequisite for filing a federal petition under 28 U.S.C. §2254 (habeas corpus by a state prisoner) which seeks to raise federal constitutional issues raised in the state direct appeal. I reached this conclusion in part because Mr. Romney told me in the 5/18/09 e-mail that he and Dunn discussed the fact (sometime after Romney wrote to Mr. Nilsen in May of 2009) that the "petition to supreme court had nothing sufficiently novel that supreme court would grant cert." (sic)[2], but he went on to state that one of the issues on appeal was sufficiency of the evidence,

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[2] I assume Mr. Romney meant to refer to a petition to the Supreme Court of California seeking Review, not certiorari. If he actually meant to discuss a "cert" petition, then it is also apparent that there is also a misunderstanding of the need to fairly present any federal claim to the United States Supreme Court. Because, however, Mr. Romney's e-mail referred to a "petition for hearing" in the California Supreme Court, I simply concluded that he is not readily familiar with appellate court nomenclature, and that he may rely on Mr. Dunn for technical knowledge in appeal.

which is a federal constitutional issue in criminal cases.[3]

13. It is my understanding that: (a) after being retained to represent Mr. Nilsen on direct appeal, Mr. Romney assured Mr. Nilsen that he would "do everything I can to have conviction reversed"[4]; (b) Mr. Nilsen relied on Mr. Romney to follow all procedural steps available to present his claims to the California Appellate Courts on direct appeal, including filing a Petition for Rehearing in the Court of Appeal and a Petition for Review in the California Supreme Court; (c) based on Mr. Romney's 2/5/09 letter to Mr. Nilsen (Exhibit A), and on Mr. Romney's 5/18/09 e-mail to me, Mr. Romney believed it was his obligation to file both the Petition for Rehearing and Petition for Review for Mr. Nilsen; (d) Mr. Nilsen believed these petitions would be filed for him; (e) Mr. Romney *intended* to cause them to be filed, but they never were.

14. On May 19, 2009, I wrote to Mr. Nilsen, advising him that Mr. Romney had stated to me that he has not filed the Petition for Rehearing or the Petition for Review in the California Supreme Court.

15. In early June, 2009, I received a letter from Mr. Nilsen asking for advice in view of the fact that he had not exhausted state remedies on his direct

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[3] Please see Exhibit D.

[4] Please see May 29, 2008 Romney Letter to Mr. Nilsen, attached as Exhibit E.

appeal. I wrote back to him on June 19, 2009, advising him that it was possible for him to seek relief from his counsel's failure to file the Petition for Review to exhaust state remedies on his direct appeal issues. In that letter I also referred him to attorneys who I know handle habeas corpus matters.[5]

16. Based on the information I have about Mr. Nilsen's situation, I believe that he has valid grounds for a petition for writ of habeas corpus under *either* the rationale of *In re Benoit* (1973) 10 Cal.3d 73 [because he reasonably relied on assurances of his counsel, who did not communicate with him about his case until almost 8 months after his conviction was affirmed in the Court of Appeal, and then, in his 2/5/09 letter inaccurately advised him that the Petition for Rehearing and Petition for Review he had promised to file *had been filed*, and denied]; or *Roe v. Flores-Ortega* (2000) 528 U.S. 470 [because appellate counsel was ineffective for failing to file a Petition for Review to exhaust state remedies, the availability of which he was unaware, and pursuant to *Roe*, Mr. Nilsen was prejudiced because he was denied that appellate proceeding]. In this regard it should also be noted that the United States Supreme Court has established that a state prisoner who is entitled to appeal is constitutionally entitled to "a complete and effective

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[5] Although I have prepared and filed dozens of habeas corpus petitions during the 34 years I have been practicing law, in general, I no longer handle habeas corpus cases.

appellate review of his conviction..."[6] and that in *Roe v. Flores-Ortega*, supra, the Supreme Court described its own holding as follows: "'[W]e hold that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Roe*, 528 U.S. at p. 484.

Executed this August 21, 2009 at Irvine, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/
William J. Kopeny
Attorney at Law

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[6] *Entsminger v. Iowa* (1967) 386 U.S. 748, 752, 87 S.Ct. 1402, 1404, 18 L.Ed.2d 501.

EXHIBIT A
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

Blumenthal
Law Offices
Devoted exclusively to the defense of the accused

February 5, 2009

John Steadman Nilsen C28087
CSP-SAC C3-11
P.O.Box 29066
Represa, CA 95671

Dear Mr. Nilsen,

I want to update you on the status of your appeal. Unfortunately, I do not have good news. As you are aware, I asked E. Thomas Dunn, a law professor and very experienced appellate attorney, to work with me on your appeal. The Appellant's Opening Brief on November 1, 2007. The Attorney General filed the Respondent's Brief on March 3, 2008, I was present when Mr. Dunn argued your appeal orally before the Court of Appeal. I had Mr. Dunn argue the appeal because he has previously worked as a research attorney at the Court of Appeal and was personally familiar with the legal concerns of each of the justices who considered your appeal.

On September 22, 2008, the Court of Appeal affirmed your conviction. Since that date, a Petition for Rehearing was filed and denied. A subsequent

petition to the Supreme Court to hear and consider your appeal was also denied.

I am dismayed by the decisions of the appellate courts in your case. However I have now exhausted all appellate remedies in your case. The appellate court rarely appoints counsel to represent an inmate for purposes of filing a *writ of habeas corpus*; they do so only when it appears there is a clear indication that trial counsel was ineffective or newly discovered evidence of your innocence exists. I am not of the opinion that either basis exists in your case. If you or your family desire, however, to pursue a *writ of habeas corpus*, I recommend tyou promptly contact E. Thomas Dunn, who specializes in handling appeals and writs in the appellate courts. You can contact him as follows:

Edward Thomas Dunn
675 N. Euclid Street, Suite 301
Anaheim, CA 92801

Please contact me if you have any questions or if I may be of service to you in the future.

Very truly yours,
Brent F. Romney
cc. Marilyn Dutkus

EXHIBIT B
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

Law Offices of
William J. Kopeny & Associates
May 2, 2009

Via Facsimile (951-788-6303)
And U.S. Mail

Brent F Romney, Esq.
Blumenthal Law Offices
The Riverside Barrister Building
3993 Market Street
Riverside, CA 92501

Re: John S. Nilsen

Dear Mr. Romney:

I have been contacted by John Nilsen for possible post-appeal representation.

To that end, I am asking that you send to me your appellate briefs, including the Petition for Rehearing and Petition for Review, and the orders denying each, as referenced in your February 5, 2009 letter to Mr. Nilsen.

Thank you for your courtesy in this matter.

Very truly yours,

WILLIAM J. KOPENY & ASSOCIATES

/s/
William J. Kopeny

EXHIBIT C
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

CALIFORNIA APPELLATE COURTS

Case Information
4th Appellate District Division 3
Court date last updated: 04/30/2009 06:05 PM
Docket (Register of Actions)
The People v. Nilsen
Case Number G038070

Date: 01/05/2007
Description: Notice of Appeal lodged/received (criminal).
Notes: By aplt John Steadman Nilsen: 80 yrs to life w/three consecutive terms of life w/o parole

Date: 01/05/2007
Description: Notice to reporter to prepare transcript.
Notes: CSR: J. Bullard

Date: 02/07/2007
Description: Record on appeal filed.
Notes: CT-3 w/prob. ofcr. rpt., RT-6. [w/11 confidential envelopes].

Date: 02/07/2007
Description: Sealed document filed******
Notes: 9 sealed envelopes filed: 8 confidential envelopes [pages 6&7, pages 9-11, pages 12-13, pages 16&17, pages 18 &19, pages 141-144, pages 315-323, pages 507-51]; 1 In-camera hearing [pages53-55].

Date: 02/07/2007
Description: Marsden transcript sent.
Notes: 2 Marsden hearings [10/25/06 pp.622-624 and 10/26/06 pp. 867-870].
Date: 03/13/2007
Description: Counsel appointment order filed.
Notes: Atty Janyce K. Blair appointed for aplt John Steadman Nilsen.

Date: 04/09/2007
Description: Requested—extension of time.
Notes: for AOB

Date: 04/12/2007
Description: Granted—extension of time.
Notes: 1st ext aob ext'd to 5/23/07

Date: 04/18/2007
Description: Substitution of attorneys filed for:
Notes: Filed on 4/17/2007 – Appellant subs out appt'd atty/Janice Blair and subs in atty/Brent F. Romney.

Date: 05/22/2007
Description: Requested—extension of time

Date: 05/24/2007
Description: Appellant notified pursuant to rule 8.220 (a)(1).
Notes: Notice RESCINDED on 5/25/07

Date: 05/25/2007
Description: Filed order vacating and appointing new counsel.

Notes: Atty Janyce Blair is vacated and Brent Romney is retained as counsel submitted from ADI.

Date: 05/25/2007
Description: Note:
Notes: Notice rescinding default notice for aob submitted this date.

Date: 05/25/2007
Description: Granted—extension of time.
Note: 1st ext – aob ext's to 6/22/07

Date: 06/25/2007
Description: Requested—extension of time.

Date: 06/25/2007
Description: Granted—extension of time.

Date: 07/26/2007
Description: Requested—extension of time.

Date: 07/27/2007
Description: Granted—extension of time.
Note: 4th ext – aob ext'd to 8/23/07

Date: 08/23/2007
Description: Requested—extension of time

Date: 08/23/2007
Description: Granted—extension of time.

Date: 09/25/2007
Description: Appellant notified pursuant to rule 8.360.

Date: 10/24/2007
Description: Requested—extension of time.

Date: 10/25/2007
Description: Granted—extension of time.

Date: 11/01/2007
Description: Appellant's opening brief.

Date: 11/29/2007
Description: Requested—extension of time.

Date: 11/29/2007
Description: Granted—extension of time.

Date: 12/27/2007
Description: Requested—extension of time.

Date: 12/27/2007
Description: Granted—extension of time.

Date: 01/29/2008
Description: Requested—extension of time.

Date: 01/30/2008
Description: Granted—extension of time.
Notes: 3rd ext to 03/03/08 for RB

Date: 03/03/2008
Description: Respondent's brief.

Date: 03/07/2008
Description: Argument letter sent.

Date: 03/21/2008
Description: Requested—extension of time.

Date: 03/21/2008
Description: Granted—extension of time.

Date: 03/27/2008
Description: Request for oral argument filed by:
Notes: Atty Brent Romney counsel for aplt. Time estimate – 15 mins.

Date: 04/14/2008
Description: Appellant's reply brief.

Date 04/14/2008
Description: Case fully briefed.

Date 04/14/2008
Description: Association of attorneys filed for:
Notes: Aplt associates in Att/Thomas Dunn as co-counsel with atty/Brent F. Romney. Original ec'd (to fax) 4/15/08. (no signature of atty/Brent Romney, he will fax a signed assn. of counsel, atty. Out of area at present.)

Date: 04/23/2008
Description: Association of attorneys filed for:
Notes: Aplt's aaty/Brent Romney assco. in atty/Thomas Dunn as co-counsel.

Date: 04/24/2008
Description: Case briefed and on assignment panel.
Notes: For June 2008 Calendar.

Date: 05/08/2008
Description: Calendar notice sent. Calendar date:
Notes: 6-17-08 at 9:00 a.m.

Date: 06/17/2008

Description: Cause argued and submitted.
Notes: Atty E. Thomas Dunn, Jr. argued for aplt.
Andrew Mestman, Deputy AG argued for resp.

Date: 06/30/2008
Description: Opinion filed.
Notes: AFFIRMED. (signed unpublished) Ikola/Sills Bedsworth

Date: 06/30/2008
Description: Submission order filed.

Dates: 09/03/2008
Description: Remittitur issued.

Date: 09/03/2008
Description: Case complete.

Date: 03/11/2009
Description: Sealed file/record sent to storage.

2009 Judicial Council of California

EXHIBIT D
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

William J. Kopeny

From: Brent Romney
[bromney@blumenthallawoffices.com]

Sent: Monday, May 18, 2009 8:44 PM

To: William J. Kopeny

Subject: RE: John Nilsen Habeas

Hi Bill!

I got your letter; sorry I did not respond quickly. I'm in trial and everything else seems to get put off. Anyway, want to get back to you ASAP and share with you my recall of events re John Nilsen's appeal, I have his entire appeal file, and can provide it to you if you need it. Tom Dunn and I worked on it together. If you look at appeal there was not a lot to argue on appeal from the transcripts of the trial. We thought the Pub Def did pretty good job. Tom orally argued it because we felt he knew 4:3 panel better than I did. Court of appeal affirmed conviction. Afterwards, Tom and I talked about the decision, and both of us thought the court's decision was expected. In our discussions, I recall asking Tom to file Application for Reconsideration, and if denied,

petition Supreme Court for hearing. I then began another 187 jury trial, then another. I didn't talk to Tom for a while. John Nilsen inquired as to status of case. I had heard nothing re Tom or appeal, so I wrote John Nilsen and advised him of outcome. I recall I told him that application for rehearing was denied and supreme court did not grant hearing, assuming I would have heard otherwise if anything different had occurred. I also told John Nilsen that a writ should be considered, and I believe I told him (I don't have the letter in front of me) the writ would not be limited to the transcript of the trial. That is where newly discovered evidence or ineffective assistance of counsel could be raised. A few days later, I contacted Tom, who told me he thought I was going to file application for reconsideration, then petition supreme court if necessary. So, no application for hearing was filed, nor was petition to supreme court filed. Tom and I again discussed case and concluded that any basis for reconsidering ruling was slight if non-existent, and petition to supreme court had nothing sufficiently novel that supreme court would grant cert. Primary issue on appeal was sufficiency of ID testimony, and related issues. Tom and I also discussed whether we thought the publ defender was effective or not, and both of us felt she did quite a good job, given the evidence.

I hope this helps. I also hope you can find something credible that can be raised in petition for writ. Quite frankly, I do not see anything that may have merit, but that is why the writ attorney should always be another atty than the atty who handled the trial or the appeal. I'm glad he has contacted you. Please let

me know if I can provide you with any assistance. If you believe an IAC argument can be raised, either at trial or appeal level, I (and I am sure Tom) will be supportive and assist you, if possible. Nilsen's right to fair trial and appeal by competent attys is more important than any ego I may have as far as the appeal goes. Please let me know if I can help. Brent

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From: William J. Kopeny
[mailto:wjk@writsnappeals.com]

Sent: Monday, May 18, 2009 6:19 PM

To: Brent Romney

Subject: John Nilsen Habeas

Dear Brent:

I sent you a letter a week or two ago, and I am writing to be sure you received it. There may be a time issue regarding this client's ability to file a timely state and/or federal habeas petition, and I would very much appreciate receiving a reply to my letter.

Thank you,

Bill Kopeny

EXHIBIT E
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

LAW OFFICES OF
BRENT F. ROMNEY

101 S. Kraemer Blvd., Suite 240
Placentia, California 92870
Phone (714) 524-3314
Fax (714)524-3315

May 29, 2008

John S. Nilsen C-288087
CPS-SAC C3-111
P.O. Box 290066
Represa, CA 95671

Dear John,

Thank you for your letter dated March 19, 2008 wherein you ask several questions regarding the appellate briefs, and in particular, the response by the Attorney General. I want to address each of your questions.

Initially, the appeal can address constitutional issues (as we do in Argument #2 in the Opening Brief), legal error by the court, or sufficiency of the evidence (as we do in Argument #1). As I reviewed the entire transcript of the trial, I did not see any "legal error" by the judge. I also asked a very experienced appellate specialist, Tom Dunn, to review it also, and he came to the same conclusion. Thinking that two heads are better than one, I

requested the court's permission to associate Tom Dunn as co-counsel, since he and I spent a lot of time discussing your appeal. Under separate cover, you will receive that request of the court.

1) Eye witness identification issues are normally a "sufficiency of the evidence" issue. That is, it is a question of fact, and if there is substantial, credible evidence of the identification of the defendant, that appellate court will defer to that of the jury, and not re-weigh the evidence. However, if the evidence pertaining to the ID of the defendant is not substantial and credible, then it is a legal question. That is, if the evidence is so confusing and inconsistent that the appellate court concludes that no reasonable jury could have found the evidence of ID sufficiently substantial and credible then the court of appeal can reveres on this basis. I discussed this legal standard of review on pages 31-32 of the Opening Brief, as well as in the Reply Brief.

2) As far as the DNA evidence, the Statement of Facts indicate that DNA found in a glove consistent with your DNA was established, However, the facts clearly stated the glove was found more than a block away. Further, it was dissimilar to the glove observed on the suspect's hand in the surveillance video. Our Reply Brief did not make these facts clear, so I will argue them during Oral Argument that currently is scheduled for June 2, 2008 in Santa Ana.

3) The failure of matching any latent fingerprints or DNA on any surfaces that the suspect touched with you is very significant. I

reviewed the Reporter's Transcript and there is a reference to those latent prints being lifted and no match. Again, I will point that out in Oral Argument as I argue that "lack of evidence" is very significant because if the suspect were in fact you, there should have been a match. This will go toward the fact that there was *not* sufficient credible evidence to convince a reasonable jury beyond a reasonable doubt.

4) The newspaper article that was photographed was, in my opinion, clearly staged. I did not include much discussion on that because I wanted to see if the Attorney General picked up on that and argued it in their Respondent's Brief. They did. Rather than point this out in our Reply Brief, I wanted to argue this orally when I can catch the AG by surprise. That, I have found, gets the attention of the appellate court justices more effectively than if it simply gets buried in the Reply Brief. Thank you for pointing this out, however. Your comments and insights are very helpful and much appreciated.

5) This issue cannot be raised in the appeal because it is not part of the record. However, it is a very good issue for a subsequent Writ of Habeas Corpus petition where we can really flesh it out.

The AG talked about the various items of evidence that tended to corroborate the shaky ID testimony. We intentionally focused on the ID testimony of witnesses in an effort to create doubt in the minds of the justices. If the eye witness testimony is questioned, it matters not if there tends to be some

corroboration, since that evidence would be insufficient to convict.

I very much agree with you that "reasonable doubt" is written all over this case. I promise you that I will continue to do everything I can to have your conviction reversed. If we are granted a new trial, I would love to represent you. I think we could really exploit the weaknesses in the case and perhaps obtain an acquittal. In any event, let's focus right now on the appeal.

I hope all is well with you. I will stay in touch.

Best wishes,

Brent F. Romney

Appendix D

Declaration of John Steadman Nilsen

I, John Steadman Nilsen, declare

1. I am petitioner in the Habeas Corpus petition of JOHN STEADMAN NILSEN, Orange County Superior Court case No. 04WF0832; Court of Appeal case No. G038070.

2. This declaration is made at the request of my habeas attorney, Correen Ferrentino, and documents my communication with my prior appellate attorney, Brent Romney, about the Petition for Review to the Supreme Court.

3. When I hired Mr. Romney to represent me on appeal, he promised to do everything legally possible to protect my rights and fight my conviction including making sure the record was "preserved" for later review in federal court if my appeal was not successful. I relied on Mr. Romney to do this. Mr. Romney knew that I might one day need to pursue further post conviction relief in my case if we lost on Appeal. On March 19, 2008, Mr. Romney stated in a letter to me regarding a question I had about appellate briefs), "this issue cannot be raised in the appeal because it is not part of the record. However it is a very good issue on habeas." Also, in a letter dated February 5, 2009, advising me that my appeal was affirmed, he wrote: "If you or your family desire, however, to pursue a writ of habeas corpus, I recommend you contact E. Thomas Dunn...."

4. In a letter dated February 5, 2009, Mr. Romney wrote to me: "I want to update you on the

status of your appeal. "on September 22, 2008, the Court of Appeal affirmed your conviction. Since that date, a Petition for Rehearing was filed and denied. S subsequent petition to the Supreme Court to hear and consider your appeal was also denied. I am dismayed by the decisions of the appellate courts in your case. However, I have now exhausted all appellate remedies in your case."

5. My appeal was affirmed on June 30, 2008. Mr. Romney never told me about this at the time. He instead waited 8 months before informing me about the appellate court decision. I did not find out about this until Mr. Romney notified me in his letter of February 5, 2009.

6. In the February 5 letter, Mr. Romney gave me the wrong date that the Court of Appeal affirmed my conviction. He wrote "On September 22, 2008, the Court of Appeal affirmed your conviction." The conviction was actually affirmed months earlier, June 30, 2008.

7. I relied on Mr. Romney to keep his promises to me and file my petition for review in the Supreme Court as he told, *he would do* and told me in writing *he did do*. If I had known that he had not done this, I would have hired another attorney to do it, or made sure I did this, so my right to have a federal court review my conviction was protected.

8. I relied upon Mr. Romney's assurances that my Petition for Review was filed. I also relied upon the incorrect dates he provided me about when my case was affirmed.

9. At no time did I cause any delay in this process nor am I at fault for my Petition for Rehearing or my Petition for Review in the Supreme Court not having been filed. After Mr. Romney notified me of the appellate court decision, 8 months after the fact, I promptly contacted appellate attorneys Bill Kopeny and on advice Correen Ferrentino, to obtain representation and help.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 9/2/09

/s/
John Steadman Nilsen
Declarant

Appendix E
Declaration of Correen Ferrentino

I, Correen Ferrentino, say:

1. I am an attorney licensed to practice law in the state of California, the U.S. District Court, Central District and the Ninth District Court of Appeal. My state bar number 172485.

2. I am the current habeas counsel for Petitioner.

3. I was retained on August 12, 2009 for purposes of seeking habeas relief.

4. Petitioner wrote to me in June of 2009 seeking assistance by way of habeas corpus relief.

5. Because I was engaged in a four week trial I was not available and was not made immediately aware of petitioner's request.

6. I received a second letter from Petitioner in July of 2009.

7. I immediately wrote to Petitioner and explained what he would need to accomplish in order to retain my services.

8. Soon thereafter I received correspondence from Petitioner indicating his desire to retain me and the necessary instruction to do so since he was incarcerated.

9. At all times Petitioner has been diligent in his

communication to me and his assistance in preparing this petition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of September, 2009 at Santa Ana, California.

/s/

Correen Ferrentino
Attorney at Law

Appendix F

LEXSEE 2008 CAL APP UNPUB LEXIS 5306

THE PEOPLE

v.

JOHN STEADMAN NILSEN

G038070

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

2008 Cal. App. Unpub. LEXIS 5306

June 30, 2008, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]

Appeal from a judgment of the Superior Court of Orange County, No. 04WF0832. William R. Froeberg, Judge.

DISPOSITION: Affirmed.

COUNSEL: Brent F. Romney; E. Thomas Dunn, Jr., for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: IKOLA, J.; SILLS, P. J., BEDSWORTH, J. concurred.

OPINION BY: IKOLA

OPINION

A jury convicted defendant John Steadman Nilsen of first degree murder (Pen. Code, § 187, subd. (a)) 1 and second degree robbery (§§ 211, 212.5, subd. (c)), and found true the special circumstance allegation he committed the murder during the commission of a robbery (§ 190.2, subd. (a)(17)(A)), and the enhancements he discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and personally used a firearm (§ 12022.53, subd. (b)). In a bifurcated trial, the jury found true allegations defendant had suffered nine prior convictions. The court sentenced defendant to an indeterminate term of life without possibility of parole, tripled, and a determinate sentence of 80 years.

1 All statutory references are to the Penal [*2] Code.

Defendant contends (1) insufficient evidence supports the jury verdict because eyewitness identifications of him were inconsistent and

untrustworthy, and (2) the trial court's denial of his pretrial suppression motion was erroneous because the forcible taking of his D.N.A. sample in 1995 under former section 290.2 2 violated his Fourth Amendment right to be free from unreasonable searches and seizures. We disagree and affirm the judgment.

2 Former section 290.2 was repealed in 1988 and replaced by section 295 et seq., the DNA and Forensic Identification Database and Data Bank Act of 1998 (Act). (§ 295; Stats. 1998, ch. 696, § 2, p. 3719.)

FACTS

On the evening of January 29, 2004, Anna Peters, assistant manager of a 99 Cents Only Store, was working at the back of the store in a warehouse open only to employees. Another employee brought into the warehouse a man who was looking for a manager. Peters asked the man, "Can I help you?" Pulling a gun from his waist area, the man pointed it at Peters's chest and asked, "Where's the safe?" Peters replied, "The safe is in the front." The man stated, "I'm not kidding." Peters said, "Please calm down. The safe is in the front." "I'm gonna give [*3] you all the money." The man told Peters they would "go to the front."

They were about to exit the warehouse when a third employee, Jovani Fuerte, entered. The man grabbed Fuerte, saying he wanted money. Fuerte, seeing the man had a gun hidden in his jacket, pulled out his wallet. The man grabbed the wallet and put it in his pocket. He said he wanted more

money and asked Fuerte where the cashier or the safe box was. The man said, "Let's go to the front." He walked out of the warehouse pushing Fuerte ahead of him and holding his gun to Fuerte's back.

Peters was behind them, but at some point "not that close." She hid "in front of the end cap on the next aisle" and tried to phone 911 on a cell phone.

The man and Fuerte walked quickly to the registers at the front of the store. Shawna Wolfgram was working at a register. The man came up to Wolfgram's register and reached in. There was a "rattling" sound as the man either tried to take cash from the register tray or to take the entire tray, and Wolfgram tried to "slap it back down," "cover the money with her hands and hold the register down." Wolfgram "said, 'I'm being robbed' into the microphone." The man pulled out a gun and shot her in the [*4] chest. Wolfgram fell to the ground and turned blue. The man ran from the store, stopped at a cinder block wall in the parking lot, looked back for a second, then "jumped over the wall."

Video taken by the store's surveillance cameras captured the suspect's left hand wearing a dark glove. An investigator found a black and gray glove in a parking lot near an alley behind the wall over which the suspect had jumped.

A forensic scientist collected a swab with sufficient D.N.A. from inside the glove to enable him "to obtain a full genetic profile." He also developed a genetic profile for defendant taken from an oral swab. He determined that although there was "D.N.A. from at least three individuals" taken from

inside the glove, a profile of the major contributor was "the same as the profile obtained from [defendant's] standard." This "major profile would be expected to occur less than one in one trillion unrelated individuals within the population."

In a photographic lineup of six photographs shown to eyewitnesses on March 19 and 20, 2004, defendant's photograph was number four. Peters, the assistant manager, and Sandra Estrada, a customer who had received change from Wolfgram just before the [*5] shooting, identified the perpetrator as the man in photograph number four. Another eyewitness, Karen Birdsong (the customer at the register next to Wolfgram's), indicated at first she did not recognize anyone in the photographic lineup, but after being asked if any person was "even close," she pointed to photograph number four and said "his mustache and eyes looked similar." A fourth eyewitness, Kristian Hayes (a customer behind Estrada in Wolfgram's line), eliminated photographs one, two, three and six, but could not eliminate photographs four or five.

All four of these eyewitnesses identified defendant in court as Wolfgram's killer.

A March 24, 2004 search of defendant's apartment uncovered brushes (which can be used to clean guns) and a 99 Cents Store bag. The police also found a January 31, 2004 Orange County Register containing an article about Wolfgram's murder underneath the refrigerator. In a small fenced-in patio area outside the apartment, behind a small figurine of a Buddha in "a knot hole of [a] tree," an officer found "an expended .38-caliber shell casing . . . ." Defendant was arrested that same day.

Defendant's older brother, Ken Nilsen, with police permission, went to [*6] defendant's apartment on March 24, 2004, to "pick up and store" defendant's personal belongings. There he "located a handgun, holster, and ski mask" which he gave to the police. 3

3 The brother was "eliminated as a possible contributor to the D.N.A. detected on the inside of the glove."

A police investigator who inspected the gun found it "was loaded with five rounds" and "the chamber underneath the hammer was empty." A forensic scientist determined the gun was a .357 magnum revolver and the ammunition was Federal brand .38 special caliber bullets. He opined the fired casing found in the knot hole of the tree was fired by the gun. He further determined that "recovered fragments of the projectile from [Wolfgram's] autopsy" appeared to come from a Federal brand .38 special or .357 magnum bullet. But due in part to the "heavy impact damage" to the projectile, he could not identify or "eliminate that particular bullet as having been fired from this revolver."

As we shall discuss in further detail below, the defense presented evidence that the eyewitness descriptions of the suspect conflicted in certain respects with one another and with the defense testimony of defendant's neighbor.

Defendant's [*7] forensic expert testified that although defendant could not be excluded as a contributor to the D.N.A. inside the glove, it was not clear his D.N.A. was actually on the glove. This uncertainty resulted from the size and mixed nature

of the sample, the impossibility of knowing how many donors were in the mixed sample, the possibility that an intermediary could have transferred defendant's D.N.A. onto the glove, and the potential that D.N.A. can last for a long time, even months and years, in a sample.

Defendant's expert on eyewitness identification, a psychology professor, testified about studies done with staged test crimes that have demonstrated the risk factors involved in obtaining accurate eyewitness identification of suspects based on photo lineups. In general, for more accurate identifications, lineups should be conducted sooner rather than later. In addition, the expert testified about the reliability of cross-racial identification: "[P]eople are generally better at identifying somebody of their own racial [or] ethnic background . . . ."

Defendant presented evidence that brushes of the type found at his apartment can be bought at auto parts stores.

The parties stipulated, inter [*8] alia, that no D.N.A. "was found on the tennis shoes and shell casing found during the search of [defendant's] home," nor were his fingerprints on the "gun, holster, Buddha, shell casing, [or] rounds found in the gun" (although the Buddha "was not processed for D.N.A. or fingerprints"). In addition, fingerprints of comparison value found at the store were not defendant's.

DISCUSSION

Substantial Evidence Supported Defendant's Conviction

Defendant contends "insufficient proof was adduced to prove to a reasonable jury that he was the culprit." He argues that given the "inconsistencies in the descriptions of the perpetrator given by the various witnesses" and the "undisputed expert testimony . . . about the inherent dangers of eyewitness identifications," the jury's verdict was unreasonable.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (People v. Rodriguez (1999) 20 Cal.4th 1, 11.) [*9] "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (People v. Bolin (1998) 18 Cal.4th 297, 331.)

At the time of his arrest, defendant measured 6'3" tall and weighed 200 pounds. He was 46 years old at the time of the shooting. A 1985 fingerprint card records his height as 6'2", his weight at 185 pounds, his build as medium, his hair as blond, and his eyes as blue. A 1989 fingerprint card notes his height as 6'3", his weight at 190 pounds, his build as heavy, his hair as blond, and his eyes as hazel.

Defendant compares these statistics to those contained in eyewitness descriptions of him, and

concludes the eyewitness identifications were vague and/or inaccurate. The six eyewitness descriptions, given in police interviews on the day of the murder, were as follows:

> (1) Hayes "described the suspect as a male white [6'1" to 6'2"] in his late forties [or] early fifties with a skinny build, approximately [150 to 170 pounds]," "a grayish goatee," and short gray hair (protruding from under a faded blue baseball cap), "wearing a t-shirt under a light colored flannel long-sleeved shirt."
>
> (2) [*10] Peters "described the suspect as a male white, [age] 40, [6' to 6'1"], [with a] thin to medium build, approximately [180 pounds], having short black and gray hair, unknown facial hair, wearing a long-sleeved light blue possible flannel shirt with unknown color t-shirt, Levi's and unknown colored shoes." While watching the surveillance video, she identified the suspect but "pointed to his head where he was wearing a beanie . . . and said she did not remember [him] having that on when he confronted her in the warehouse."
>
> (3) Birdsong described the suspect as a "male white" "in his late forties or early fifties" approximately 6'1" tall, weighing approximately 190 pounds, with "a thick mustache that extended down past the corners of his mouth" and wearing "a grayish blue knit beanie cap, blue jean pants, and a medium gray long-sleeved sweater."

(4) Estrada described the suspect as a male white "in his fifties," approximately 6'3" to 6'5", "thin to a medium build," wearing "some type of beanie," blue jeans and a blue sweatshirt, with gray or white hair and a "sucked up and dirty" face, "deep, sunken eye sockets," and "slender facial features."

(5) Fuerte described the suspect as a male white [*11] in his forties, with short, blond hair "sticking out of a black beanie," with an unshaven mustache, weighing about 160 to 175 pounds, over six feet tall, and "tall and skinny."

(6) Jon Hook, a witness who observed the suspect run out of the store and jump over a cinder block wall, described the man as wearing "some kind of long-sleeve attire and a beanie." At trial Hook described the suspect as "about six one-ish, [with a] slender build."

Contrary to defendant's assertion that these six descriptions are replete with inaccuracies and inconsistent with one another, they share much in common and generally accord with defendant's vital statistics. All six eyewitnesses described the suspect as a (1) white man, (2) around 6'1" or slightly taller, (3) wearing a long-sleeved top (with the exception of Fuerte who did not describe any clothing) and some type of cap (with the exception of Peters who did not recall the man wore a hat in the warehouse), and (4) in his forties (with the exception of Estrada who specified in his fifties, and Hook who apparently did not mention age).

Defendant stresses he weighed 200 pounds "at the time of his arrest (less than two months after the crimes)." The eyewitnesses [*12] judged his weight as between 170 to 190 pounds (with the exception of Estrada and Hook who did not estimate his weight in pounds). In addition, Hayes called the suspect's build "skinny," and Fuerte and Hook "slender." Of course, defendant may have gained weight in the intervening two months between the shooting and his arrest. Also, the long-sleeved top worn by the suspect may have cloaked his build to a certain extent. Finally, opinions as to what constitutes a slender build, compared to a medium one, will vary with the beholder; even the official fingerprint cards designated defendant as of medium or heavy build based on a differential of only five pounds. (The fingerprint cards also conflicted on his height by one inch and his eye color, blue versus hazel.)

Defendant asserts he "did not have blonde hair," yet Fuerte described his hair as blond. But defendant fails to inform us of his true hair color or to point us to any record reference on this subject. Instead, he asserts a 1998 black and white photograph in the record shows he has "virtually no hair at all," a statement unsupported by the actual photo. Defendant's 1985 and 1989 fingerprint cards record his hair as blond at that [*13] time. Hayes, Estrada, and Peters described the suspect's hair color as, respectively, gray; white or gray; or gray and black -- descriptions defendant does not contend are inaccurate.

Defendant alleges other inaccuracies, inconsistencies, or failure of recall. He points out

Peters could not "identify [his] shoes or their color." He notes the only witness who described a gray long-sleeved sweater was Birdsong. He quibbles that he is not exactly 6'1." He complains Hayes is the only witness who saw a gray goatee or a faded blue baseball cap. He observes Estrada is the only one who saw a sucked up, dirty face. He contrasts the eyewitness descriptions with his neighbor's testimony for the defense that defendant was tall "and regular," not "overly" or "real skinny," and the neighbor did not recall him having a beard or "Fu Manchu mustache" or ever looking "scruffy" or "dirty."

These purported inconsistencies or inaccuracies do not render the jury's verdict unreasonable. "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and] where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing [*14] court." (In re Gustavo M. (1989) 214 Cal.App.3d 1485, 1497.) "Apropos the question of identity, to entitle a reviewing court to set aside a jury's finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all. [Citations.] The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to

the attention of the jury . . . ." (People v. Lindsay (1964) 227 Cal.App.2d 482, 493-494.)

Moreover, additional substantial evidence (besides the eyewitness identifications) supported defendant's conviction: the dark glove seen on the surveillance video and found on the suspect's escape route; the D.N.A. inside the glove to which defendant was a major contributor; the fired .38 caliber casing in a tree outside his home; the discovery in his apartment of a newspaper article on the killing, several brushes, and the .357 handgun which fired [*15] the expended shell and could not be excluded as the weapon that shot Wolfgram; and the "Federal" brand shared by the ammunition in the gun and the bullet that killed Wolfgram. Accordingly, defendant's substantial evidence challenge to his convictions fails.

The Trial Court Did Not Err by Denying Defendant's Suppression Motion

Defendant filed a section 1538.5 pretrial motion to suppress evidence, arguing, inter alia, the 1995 taking of his D.N.A. without his consent pursuant to former section 290.2 constituted an illegal seizure. 4 The court denied defendant's suppression motion, except as to four items irrelevant to the issue at hand.

4 The People's opposition to the suppression motion alleged that in 1995, defendant was in prison serving a sentence for kidnapping, robbery, assault with a deadly weapon (firearm), and other felony counts.

On appeal, defendant contends the court should have granted his suppression motion because he "would not have even been a suspect in this case absent a cold 'hit' which indicated a potential match between the D.N.A. sample found in the glove . . . and a D.N.A. sample [he] was compelled to provide in 1995 . . . ." He argues the taking of his D.N.A. in [*16] 1995 violated his Fourth Amendment right to be free from unreasonable searches and seizures, and concludes "the evidence seized in this case, including the identity of [defendant] as a suspect, is fruit of the poisonous tree."

Defendant acknowledges "his argument is contrary to currently controlling case law" -- noting the D.N.A. data base statute "has been upheld not only in California's appellate courts . . ., but in the Ninth Circuit Court of Appeals" -- but "wishes to preserve the issue for further appellate review."

"'DNA data base and data bank acts have been enacted in all 50 states as well as by the federal government. [Citations.] Various constitutional challenges to these acts have been rejected consistently. [Citation.] A challenge to former section 290.2, the predecessor of the Act, was rejected in this state by People v. King [2000] 82 Cal.App.4th 1363 . . . . The various decisional authorities addressing and rejecting constitutional challenges to state DNA data base and data bank acts are collected in the Annotation, Validity, Construction, and Operation of State DNA Database Statutes [(2000)] 76 A.L.R. 5th 239.['] [P] 'In view of the thoroughness with which constitutional [*17] challenges to DNA data base and data bank acts have been discussed, there is little we would venture

to add. We agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy [which specifically extends to the person's identity ([citation])] and the intrusions authorized by the Act are minimal; and (3) the Act serves compelling governmental interests. Not the least of the governmental interests served by the Act is "the overwhelming public interest in prosecuting crimes accurately." [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest. We agree with the decisional authorities that have gone before and conclude that the balance must be struck in favor of the validity of the Act.'" (People v. Adams (2004) 115 Cal.App.4th 243, 257-258, (Adams).)

The Ninth Circuit agrees: "In light of conditional releasees' substantially diminished expectations of privacy, the [*18] minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances. Therefore, we today realign ourselves with every other state and federal appellate court to have considered these issues-squarely holding that the [DNA Analysis Backlog Elimination Act of 2000] satisfies the requirements of the Fourth Amendment." (U.S. v.

Kincade (9th Cir. 2004) 379 F.3d 813, 839, fn. omitted.)

Defendant argues "binding United States Supreme Court precedent . . . requires a 'special need' beyond that of ordinary law enforcement in order to engage in a balancing of competing interests of the government and the person tested." This argument echoes the Adams defendant's contention the appellate court was required to "identify a '"special needs" beyond the normal need for law enforcement' before undertaking a balancing analysis." (Adams, supra, 115 Cal.App.4th at p. 258.) The Court of Appeal rejected that assertion, explaining it "overlooks the fact that the class of persons [*19] subject to the Act is convicted criminals, not the general population. As stated above, convicted criminals do not enjoy the same expectation of privacy that nonconvicts do. The cases on which defendant relies involved different populations of test subjects. [Indianapolis v. Edmund (2000) 531 U.S. 32,] 41, involved motorists being stopped at drug interdiction checkpoints for the primary purpose of uncovering evidence of criminal wrongdoing. Ferguson [v. Charleston (2001) 532 U.S. 67,] 77-78, involved state hospital obstetrics patients who had an expectation of privacy in their medical records and who were subjected to an invasion of privacy which was 'far more substantial' than in the cases of other drug test subjects." (Ibid.) Here, defendant's reliance on National Treasury Employees Union v. Von Raab (1989) 489 U.S. 656 to assert the necessity for a "special needs" analysis, is similarly misplaced, since that case involved employees of the United

States Customs Service seeking "transfer or promotion to certain positions." (Id. at p. 659.)

Finally, defendant argues a law requiring an invasion of a parolee's or inmate's Fourth Amendment rights must "serve [*20] a legitimate penological interest," relying on Turner v. Safley (1987) 482 U.S. 78. But that case explained that "when a prison on regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." (Id. at p. 89, italics added.) We are not dealing here with a prison regulation.

DISPOSITION

The judgment is affirmed. lKOLA, J.

WE CONCUR: SILLS, P. J., BEDSWORTH, J.

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(2)

No. 10-240

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

JOHN STEADMAN NILSEN, *Petitioner-Appellant,*

v.

THE STATE OF CALIFORNIA, *Respondent-Appellee.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF FOR THE RESPONSE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the denial of a petition for review in the California Supreme Court, which is a second-tier discretionary review, results in a decision on the merits, thus requiring this Court to reconsider and/or limit *Ross v. Moffitt*, 417 U.S. 600 (1974).

2. Whether petitioner was denied the effective assistance of counsel under the constitution when his attorney did not file a petition for review in the California Supreme Court (second-tier discretionary review) following the denial of his appeal (first-tier review)

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STATEMENT OF THE CASE

Petitioner entered the 99 Cents Only store in Huntington Beach, California, brandished a large silver revolver, and asked the store manager, "Where's the safe?" Petitioner and a store employee walked to the front of the store to the cash register where Shawna Wolfgram was working. Petitioner began to grab money from Wolfgram's open cash register. Wolfgram asked petitioner what was happening, grabbed petitioner's arm, and then exclaimed that she was being robbed. Petitioner raised his revolver and shot Wolfgram in the chest, killing her.

An Orange County Superior Court jury found petitioner guilty of first degree murder and second degree robbery. The state trial court sentenced petitioner to state prison for three consecutive life terms without the possibility of parole, plus eighty years.

On June 30, 2008, the California Court of Appeal affirmed the judgment. Petitioner's petition for review to the California Supreme Court was due on August 11, 2008. Cal. Rule of Ct. 8.264(b) & 8.500(e)(1). Petitioner did not timely file a petition for review. Rather, more than a year later, on September 29, 2010, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, seeking leave to file a late petition for review. The California Supreme Court denied that petition without comment. Petitioner then petitioned for certiorari.

REASONS FOR DENYING CERTIORARI

I. THE DENIAL OF A PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT IS A SECOND-TIER DISCRETIONARY REVIEW THAT DOES NOT CONSTITUTE A DECISION ON THE MERITS; THE STATE COURT'S RULING IN THIS CASE DOES NOT CREATE A CONFLICT WITH THIS COURT'S JURISPRUDENCE OR CREATE A CONFLICT IN THE LAW

Following the denial of his appeal, petitioner failed to file a petition for review in the California Supreme Court. His subsequent petition for writ of habeas corpus, seeking leave to file a belated petition for review, was denied. Petitioner now asserts that the denial of a petition for review in the California Supreme Court results in a decision on the merits. Thus, according to petitioner, he was entitled to an attorney and effective assistance in filing a petition for review under *Halbert v. Michigan*, 545 U.S. 605 (2005). (Pet. at 7.)

Petitioner's claim is based on a faulty premise and does not warrant review by this Court. A petition for review in the California Supreme Court is a second-tier discretionary appeal to the state supreme court. A denial of such a petition does not constitute a decision on the merits. Consequently, petitioner had no right to effective counsel for purposes of filing his petition for such discretionary review in the California Supreme Court. Further, this case does not create a conflict in this Court's jurisprudence and is not an appropriate vehicle for this Court to expand upon established precedent regarding the right to counsel in discretionary appeals.

In *Douglas v. California*, 372 U.S. 353 (1963), this Court recognized that the Fourteenth

Amendment guarantees a criminal appellant the right to counsel on a first appeal as of right. This Court held that "fair procedure" and "equality" demand that the indigent be given the benefit of counsel in such a situation. *Id.* at 357–358.

In *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court declined to extend the right to counsel beyond a defendant's first appeal from his criminal conviction. In *Ross*, the petitioners sought the appointment of counsel for a second-tier discretionary appeal to a state of North Carolina Supreme Court and for certiorari review to the Supreme Court. *Id.* at 604. This Court held that neither the due-process clause nor the equal-protection clause requires a state to provide an indigent with counsel either on his discretionary appeal to the state supreme court or on his petition for certiorari in the United States Supreme Court.

In *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam), this Court held that a state criminal defendant has no Fourteenth Amendment right to the effective assistance of counsel when pursuing a discretionary state appeal. "Since respondent had no constitutional right to counsel he could not be deprived of the effective assistance of counsel." *Id.* at 587-88. The four-paragraph opinion relies only on *Ross v. Moffitt*.

Finally, in *Halbert v. Michigan*, 545 U.S. 605 (2005), this Court evaluated the right to counsel in the context of a Michigan law providing that "an appeal by an accused who pleads guilty or nolo contendere shall be by the leave of the court." *Id.* at 609., citing Mich. Const., art. 1 § 20. This Court ruled that the Michigan Court of Appeals' review of an application for leave to appeal ranks as a first-tier appellate proceeding requiring appointed counsel for indigent defendants under *Douglas*. This Court

reasoned that two aspects of the Michigan Court of Appeals' process following plea-based convictions compelled this conclusion. *Id.* at 617. First, the Michigan Court of Appeals must look to the merits of an appellant's claims in ruling on the application for leave to appeal. Second, indigent defendants pursuing review in the intermediate appellate court are frequently ill-equipped to represent themselves. *Id.*

Relying upon the reasoning of *Halbert*, petitioner contends that the denial of a petition for review by California Supreme Court is a ruling on the merits and that, as such, he was entitled to effective assistance when filing a petition for review. Petitioner is incorrect.

In California, Rule of Court 8.500 governs a party's right to file a petition in the Supreme Court for review of any decision of the Court of Appeal. California Rule of Court 8.500(b) identifies the grounds for which the state Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(2) When the Court of Appeal lacked jurisdiction;

(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

The order of denial is not an expression of the Supreme Court on the correctness of the Court of Appeal opinion. *People v. Triggs*, 8 Cal. 3d 884, 890 (1973); *People v. Saunders*, 5 Cal. 4th 580, 592 n.8 (1993) ("We recently reaffirmed 'the well-established rule in this state that a denial of a petition for review is not an expression of opinion of the Supreme Court

on the merits of the case. [Citations.]' (*Camper v. Workers' Comp. Appeals Bd.* 3 Cal. 4th 679, 689, fn. 8 (1992) [12 Cal.Rptr.2d 101.)"); *Trope v. Katz*, 11 Cal. 4th 274 (1995) ("It is well established that our refusal to grant a hearing in a particular case is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court.") (internal quotations omitted); *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 605 n.3 (9th Cir. 1986); *see also* Cal. Rule of Ct. 28 Advisory Com. comment ("It has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. . . . Denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion.")(internal citations omitted).

A petition for review in the California Supreme Court is a second-tier appeal following a decision by the court of appeal. This matter is clearly unlike *Douglas* and *Halbert*, which involved first-tier appellate proceedings. *Halbert* recognized a right to counsel in certain "discretionary" proceedings. The appellate procedure at issue there was effectively the only means of direct review available to the petitioner. The appeal procedure at issue in *Halbert* was "discretionary," but was equivalent to direct review. Here, like in *Ross*, petitioner already received direct review of his convictions, and already received the assistance of counsel in connection with that first appeal. Like *Ross*, a petition for review involves a second-tier discretionary appeal to a state Supreme Court following a first-tier appeal to the Court of Appeal in which the right to counsel had attached.

Ross at 604. As such, neither the due-process clause nor the equal-protection clause required that California provide petitioner with counsel on his petition for review. Consequently, since petitioner had no constitutional right to counsel he could not be deprived of the effective assistance of counsel. *Wainright*, 455 U.S. at 587-88. *Ross* and *Wainright* are directly on point and this case does not create a conflict with this court's jurisprudence or create a conflict in the law regarding effective assistance counsel. *See also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals.")

Petitioner's reliance upon Ninth Circuit habeas corpus case law for the proposition that a denial of a state petition for review results in a decision on the merits is completely misplaced. (Pet. at 7.) These cases express that the California Supreme Court's denial of a habeas petition will be a ruling on the merits sufficient to exhaust a federal claim for purposes of subsequent federal habeas corpus review. California law, however, makes it clear that the denial of a petition for review by the California Supreme Court is not an expression on the merits of the cause.

In any event, this case would present a poor vehicle for this Court to further reconsider or limit the holding in *Ross v. Moffitt*. Petitioner never raised this argument in the California courts, nor did he seek to have counsel appointed for purposes of filing a petition for review. The California courts, then, were precluded from considering petitioner's claim. This court would be the first to do so.

In sum, petitioner's justifications that this Court grant certiorari rest entirely on the faulty

premise that the denial of a petition for review by the California Supreme Court results in a decision on the merits. As shown above, petitioner is wrong. None of petitioner's claims warrants granting certiorari.

II. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HAS NO MERIT AND DOES NOT WARRANT GRANTING CERTIORARI

Petitioner contends that he was deprived of effective assistance of counsel because the attorney for his direct appeal failed to file a petition for review in the California Supreme Court. He suggests that his appellant counsel was constitutionally obligated under his first-tier obligations to file his Petition for Review. Because there is no right to counsel for seeking a discretionary review, as is involved with a petition for review to the California Supreme Court, counsel's failure to file the Petition for Review in the California Supreme Court cannot be deficient performance. *Ross,* at 616.

Even if he had a constitutional right to effective assistance here, petitioner's claim would fail. To establish ineffective assistance of counsel, Petitioner must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard applies equally to appointed appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985).

To establish ineffective assistance of counsel the defendant must show both incompetence and prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *Strickland,* at 687. As to competence, the defendant must show that counsel was deficient, i.e., "counsel's representation fell below an objective

standard of reasonableness." *Strickland,* at 688. Even if incompetence is established, that alone does not justify reversal. The defendant must also show prejudice. Specifically, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* at 693-94.

Here, petitioner cannot demonstrate he suffered prejudice by the failure to file a petition for review because it is highly unlikely such review would have been granted had a petition been filed. The Court of Appeal opinion (Pet. App. E, at 35-50) was sound, did not involve a split in authority, or an important question of law. *See* Cal. Rule of Ct. 8.500(b)(1). Petitioner cannot demonstrate he was prejudiced by his counsel's failure to file a petition for review.

Furthermore, petitioner certainly had an adequate alternate remedy. When petitioner first learned that his petition for review had not been filed, petitioner could have filed a petition for writ of habeas corpus in the California Supreme Court raising his direct appeal issues. *See In re Robbins*, 18 Cal. 4th 770, 814, fn. 34 (1998)(holding that claims of ineffective assistance of counsel may be brought on habeas when otherwise would be barred); *Massaro v. United States*, 538 U.S. 500, 504-08, (2003) (holding that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.") Thus, to the extent petitioner might still present his substantive claims to the California Supreme Court, petitioner's claim before this Court is not ripe.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: November 12, 2010

Respectfully submitted

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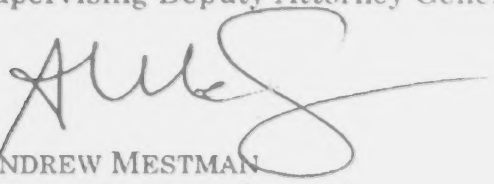

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No. 10-240

In the Supreme Court of the United States

JOHN STEADMAN NILSEN, *Petitioner-Appellant*,

v.

THE STATE OF CALIFORNIA, *Respondent-Appellee*.

CERTIFICATE OF SERVICE BY MAIL

I, Andrew Mestman, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **November 12, 2010**, three (3) copies of the **BRIEF FOR THE RESPONSE IN OPPOSITION** in the above-entitled case were mailed, first class postage prepaid to:

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I further certify that all parties required to be served have been served.

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v.

THE STATE OF CALIFORNIA, *Respondent-Appellee.*

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 2,223 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 12, 2010

Respectfully submitted,

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177 (3) No. 10-240

In The
Supreme Court of the United States

John Steadman Nilsen,
Petitioner,

v.

State of California,
Respondent.

On Petition for a Writ of Certiorari
to the California Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER JOHN NILSEN

ARGUMENT

This court should grant review to resolve the issue as to the duties, if any, of appellate counsel beyond presentation of oral argument in the appellate court, when counsel knows the criminal defendant wants to seek review of his conviction in the federal courts.

The State claims this case "would present a poor vehicle for this court to further reconsider or limit the holding of *Ross v. Moffitt*." (Opp. at 6.) Petitioner disagrees. The issue raised here regarding the parameters of appellate counsel's constitutional duties on tier-one direct appeal, at least until the decision is rendered and that decision is timely transmitted to the defendant (enabling the defendant to timely petition a higher court and exhaust the state record pro se) is a very important issue in criminal law which remains unresolved in the state courts. Several jurisdictions follow the approach urged by Nilsen and require appellate counsel as part of its duties on direct review, to at least notify the defendant that the decision has issued and transmit the decision to the defendant in a timely manner.[1] And the issue is made ever more important

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[1] See *Sims v. State*, 998 So. 2d 494 (Fla. Sup. Ct. 2008) (holding that appellate counsel maintains the obligation of effective representation to the defendant- client at least until the decision of the appellate court is rendered and transmitted to the defendant); *People v. Valdez*, 789 P.2d 406, 408 (Colo. 1990) (holding that the failures of appellate counsel that

because of the exhaustion requirement and statute of limitations for defendants seeking relief in federal court after AEDPA. At a minimum, this case is ripe for, and this Court should consider, granting summary reversal of the decision of the Supreme Court of California.

Petitioner's counsel was ineffective on his first-tier obligations on direct appeal and petitioner was prejudiced by these failings because he was deprive of filing his petition in the California Supreme Court Pro Se.

The flagrant misadvice and these failings, which prevented Nilsen from timely filing his pro se petition for review in the California Supreme Court and exhaust state remedies, occurred when Nilsen was represented by counsel during the *direct appeal* to the California appellate court. Appellate counsel's duties during direct appeal do not immediately conclude upon the presentation of oral argument in the court of appeal. Appellate counsel must maintain

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preclude the timely filing of a petition for discretionary review may constitute ineffective assistance); *Tolliver v. State*, 629 S.W.2d 913, 915 (Tenn. Crim. App. 1981) (holding that the failures of counsel that preclude a criminal defendant from filing a pro se petition for discretionary review may constitute ineffective assistance); *Ex parte Riley*, 193 S.W.3d 900, 901-02 (Tex. Crim. App. 2006) ("It is the responsibility of counsel appointed on appeal to see the appeal of right through to the end. . . . Normally, when an appellant is not informed of the decision of the court of appeals by his attorney in time for him to file a petition for discretionary review, it will be ineffective assistance of counsel.").

an obligation of effective representation to his client at least until the decision of the appellate court is rendered and that decision is transmitted to the defendant so that the defendant can file the necessary paperwork pro se to preserve his rights to pursue relief in the federal courts. This is particularly true when, as here, counsel knows his client wishes to seek a writ of habeas corpus in federal court. See Appendix B, Declaration of Appellate Counsel.

Here appellate counsel did not notify his incarcerated client that he lost on direct appeal until almost eight months afterwards. And when he finally did notify Nilsen of the decision, he falsely told him that the petition for rehearing and petition for review he had promised to file, *had been filed*, and denied. Appendix B. Thus, these failings occurred during a proceeding in which Nilsen had the constitutional right to effective assistance of appellate counsel. The failures of counsel during the first direct appeal amounted to ineffective assistance of appellate counsel.

The State does not dispute that Nilsen's petition for review to the California Supreme Court was never filed due solely to the dereliction of appellate counsel. But the state seeks to characterize the issue before this Court as whether petitioner was deprived of effective assistance of counsel because the attorney for his direct appeal failed to file a petition for review in the California Supreme Court. (Opp. at 7.) Thus the state concludes that "[B]ecause there is no right to counsel for seeking discretionary review, as is involved with a petition for review to

the California Supreme Court, counsel's failure to file the Petition for Review in the California Supreme Court cannot be deemed deficient performance." (Opp. at 7; citing, *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The State focuses only on a the issue concerning the performance of counsel during the *discretionary review* stage (i.e., no right to counsel to file a petition for review), whereas the question presented here pertains only to the failures of counsel during the *direct appeal* proceedings. The failures of appellate counsel during the direct appeal precluded Nilsen from being able to exhaust his state issues pro se. Therefore, these failures constituted deficient performance during the direct appeal (not during discretionary review.)

Ross v. Moffitt does not resolve the question presented here. The rational of *Ross* was that a defendant who received effective assistance of appellate counsel in a first- tier appeal would be armed with a trial transcript, an appellate brief setting forth his claims, and the court's opinion disposing of the case. *Ross v. Moffitt*, 417 U.S. at 616; see also, *Halbert v. Michigan*, 545 U.S. 605 (2005). Hence, a defendant, armed with these materials, would have adequate information to proceed on his own. Here Nilsen received none of these items. And he never even had knowledge of the appeals court's decision in time to file a petition for review pro se. Appendix B; Appendix D, Declaration of Appellant.

The State claims petitioner cannot demonstrate he suffered prejudice by the failures of appellate counsel "because it is highly unlikely such review would have been granted had a petition been

filed." (Opp at p. 8.) The state fails to recognize that in California a criminal defendant whose conviction has been affirmed on appeal may file a petition for review in the California Supreme Court *solely to exhaust state remedies*. California Rule of Court, Rule 8.508. Such a petition is not filed with an expectation of the California Supreme Court granting review; rather it is done to exhaust state remedies for purposes of later filing a federal habeas corpus petition. The petition contemplates that there are no viable issues for review in the California Supreme Court. Moreover, the State asserts that the denial of a petition for review does not constitute a decision on the merits. (Opp. at 2.) If so, then it cannot be argued by the State in a prejudice analysis that Nilsen's constitutional claims are without merit merely because the California Supreme Court denied his petition.

The correct prejudice analysis is whether appellate counsel's failures on direct review caused Nilsen to not exhaust his state remedies by filing a petition for review in the California Supreme Court (to exhaust under Rule 8.508 or otherwise), a precursor to Federal habeas review. The answer is yes. Appellate Counsel's own sworn affidavit (Appendix B) states,

> "[W]hen retained to represent Nilsen, I advised him that I would file his appeal and ensure that his state appellate rights were exhausted. I was aware that he might want to later file a writ of habeas corpus in state and federal court. [¶] I intended to cause a

> Petition for Rehearing and a Petition for Review with the California Supreme Court.... [¶] In a letter dated February 5, 2009, I wrote to Nilsen to advise him of the decision of the appellate court and inform him that a petition for Rehearing with the Court of Appeal and a Petition for Review with the California Supreme Court had been filed .... I wrote, I have now exhausted all appellate remedies in your case. [¶] In a February 5 letter, I provided Nilsen the wrong date that the Court of Appeal affirmed his conviction. I wrote the conviction was affirmed on September 22, 2008. The conviction was actually affirmed June 30, 2008."

The State argues that petitioner had an adequate alternative remedy, filing a petition for writ of habeas corpus in the California Supreme Court. (Opp. at 8.) Not so. Petitioner sought to exhaust his claims raised on direct appeal; specifically, sufficiency of evidence, which is a federal constitutional issue in criminal cases. Nilsen is procedurally barred from raising the identical issue on habeas as direct appeal. *In re Waltreus* 62 Cal. 2d 218, 225 (1965)

Nilsen exercised diligence in attempting to file his petition for review. Through habeas counsel petitioner filed a petition for writ of habeas corpus on September 23, 2009[2] to file a belated petition for

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[2] In its statement of the case, the State inaccurately notes that petitioner filed a writ of habeas corpus in the California

review. He also attempted to file a petition for review of his direct appeal and to exhaust his available state remedies. But receipt was denied by the clerk of the California Supreme Court for "lack of jurisdiction."

Here, petitioner did not have knowledge of the decision, transcripts, the Court of Appeal opinion or the accurate date of the court's decision allowing him to seek petition for review. Petitioner's petition for review to the California Supreme Court was due on August 11, 2008. Cal. Rule of Court 8.264(b) & 8.500(e)(1). Petitioner was not advised by appellate counsel of the appellate court decision until February 5, 2009. And even then, counsel provided the wrong date that the court of appeal affirmed the conviction. Counsel also falsely told petitioner he had timely filed a petition for review therefore petitioner had no reason to think that any action was necessary on his part. In May, 2009, Nilsen wrote to attorney William Kopeny seeking legal representation to collaterally attack his conviction. Appendix C, D and E.

Supreme Court on September 29, 2010; in fact he filed it on September 23, 2009.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the California Supreme Court.

Respectfully submitted,

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December 8, 2010